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No. 10-84

Supreme Court, U.S.
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In The

Supreme Court of the United States

TERRI CRANDALL AND JOANN HUBBARD,

Petitioners,

v.

CITY AND COUNTY OF DENVER, COLORADO, D/B/A THE DENVER INTERNATIONAL AIRPORT, A COLORADO POLITICAL SUBDIVISION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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SUMMARY OF THE CASE

Petitioners Terri Crandall and JoAnn Hubbard sued Respondent City and County of Denver pursuant to the citizen-suit provision of the Federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(a)(1)(B) ("RCRA"), seeking, among other things, mandatory injunctive relief prohibiting full-plane gate deicing at Denver International Airport ("DIA"). After a five-day trial, the District Court found that Denver no longer permits full-plane deicing at the gates, citing numerous reasons therefore, and held that Petitioners had not shown the current and future use of aircraft deicing fluid ("ADF") "may present an imminent and substantial endangerment to health," which is a prerequisite for injunctive relief under RCRA. In short, both the District Court and the Tenth Circuit Court of Appeals determined, based on facts in the record and applicable law, that Petitioners failed to make a case for RCRA liability, and the courts therefore denied the permanent injunctive relief Petitioners sought.

ARGUMENT

Petitioners brought this action against the City and County of Denver pursuant to the citizen-suit provision of RCRA, which provides that "any person may commence a civil action on his own behalf . . . against any person . . . who has contributed or who is contributing to the . . . handling . . . or disposal of any

solid . . . waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The lawsuit was based primarily on the allegation that the use of ADF at Concourse B of DIA may present an imminent and substantial endangerment to human health.

The ADF used at DIA is primarily composed of propylene glycol, which in its liquid form is not hazardous, but which can produce hydrogen sulfide gas when it decomposes. [Pet. Appx. page 48.] Exposure to very high levels of hydrogen sulfide gas can result in adverse health effects. For a period of time, Denver allowed full-plane deicing while airplanes were at the gates of Concourse B. During this period, there were a number of complaints about odors and health effects in Concourse B. The odor complaints were indicative of the presence of hydrogen sulfide gas. [Pet. Appx. pages 32-33.][1]

In February 2005, Petitioners brought this action to obtain an injunction prohibiting full-plane deicing at the gates of Concourse B. A short time thereafter, DIA sharply curtailed deicing at the concourse gates and directed that the procedure be conducted at deicing pads away from the gates. [Pet. Appx. page 35.] There were numerous economic and operational reasons for DIA's restriction of full-plane gate deicing procedures. [Pet. Appx. pages 60-61.] Subsequently,

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[1] All citations of "Pet. Appx." are references to the Petition for Writ of Certiorari.

there were far fewer odor complaints and no objective evidence of the presence of hydrogen sulfide gas in Concourse B. [Pet. Appx. pages 35-36; 50.]

Following a bench trial in April 2008, the District Court denied Petitioners' request for an injunction prohibiting Denver from resuming full-plane gate deicing at DIA. Specifically, the District Court rejected Petitioners' argument that the possibility of a resumption of full-plane gate deicing constituted an imminent and substantial endangerment sufficient to warrant injunctive relief under RCRA. [Pet. Appx. page 62.]

The District Court found that the policy of restricting full-plane gate deicing was the result of a number of economic and operational factors which were unrelated to Petitioners' lawsuit and which would continue to be in effect in the future. [Pet. Appx. pages 60-61.] The District Court concluded that Petitioners failed to prove a resumption of full-plane gate deicing after the conclusion of the litigation was likely as opposed to a mere speculative possibility. [Pet. Appx. page 19.] The District Court therefore concluded the possibility of a resumption of full-plane gate deicing did not constitute a present risk of a harm that may arise in the future from the use of propylene glycol. [Pet. Appx. pages 53; 60-62.]

The District Court went on to find that, even if there was a resumption of full-plane gate deicing, Petitioners failed to prove that the procedure would likely generate enough hydrogen sulfide gas to pose a

hazard to public health. [Pet. Appx. pages 61-62.] Based on these findings, the District Court ruled that Petitioners were not entitled to injunctive relief under RCRA because any potential endangerment from the future use of propylene glycol was neither substantial nor imminent. [Pet. Appx. page 62.]

The Tenth Circuit Court of Appeals affirmed the District Court's determination that Petitioners were not entitled to the issuance of a permanent injunction pursuant to RCRA. The Court of Appeals applied the standard elements for the issuance of a permanent injunction: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1180 (10th Cir. 2003). [Pet. Appx. page 10.] According to the Court of Appeals, the first element was dispositive because Petitioners failed to prove at trial that the possibility of a resumption of full-plane gate deicing presented an imminent and substantial endangerment to health.

The Court of Appeals' review of governing precedent began with the rule enunciated in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996), that RCRA's citizen-suit provision allows for only prospective relief, and it does not afford a remedy for past contamination that no longer poses a danger. [Pet. Appx. page 12.]

The Court of Appeals then reviewed decisions analyzing RCRA's provision concerning solid waste that "may present an imminent and substantial endangerment." The Court of Appeals discussed how these decisions explained that the "endangerment" addressed by RCRA is simply the current or imminent risk of a harm occurring in the future. [Pet. Appx. pages 12-15.] Accordingly, the statutory requirement of an "endangerment" is satisfied if a defendant's handling of a solid waste may create a present or imminent risk that a harm will result in the future if remedial measures are not taken. [Pet. Appx. page 16.]

Petitioners' claim for injunctive relief under RCRA failed, the Court of Appeals stated, because Petitioners did not meet their burden of proving that there was an imminent endangerment from the use of ADF at DIA. At the time of trial, there was no detectable hydrogen sulfide gas in Concourse B, and Petitioners were unable to establish a likelihood that the alleged endangering conduct (i.e., a resumption of full-plane gate deicing) was imminent after the termination of the lawsuit. [Pet. Appx. pages 17-18.] This evidentiary shortcoming was compounded by Petitioners' failure to present any evidence that a resumption of full-plane gate deicing would likely result in amounts of fugitive ADF sufficient to generate harmful levels of hydrogen sulfide gas. [Pet. Appx. pages 18-19.]

In assessing RCRA's provision concerning solid waste that "may present" an imminent and substantial endangerment, the Court of Appeals observed

that "there is a limit to how far the word 'may' can carry a plaintiff." [Pet. Appx. page 15.] In affirming the District Court's denial of a permanent injunction, the Court of Appeals made a straightforward application of the case law interpreting RCRA. As the Court of Appeals observed, the governing precedent makes clear that it is not enough under RCRA for a plaintiff to prove only that "in the future someone may do something with solid waste that, absent protective measures, can injure human health." [Pet. Appx. page 18.]

It is well settled that a plaintiff seeking an injunction has the burden of proving "that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed.2d 1303 (1953). The mere theoretical possibility of a repeat violation is not enough. *Cf. Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

Petitioners have set up the proverbial "straw man" by erroneously asserting that they were denied the opportunity of obtaining injunctive relief under RCRA only because Denver curtailed full-plane gate deicing after Petitioners filed suit. Petitioners' burden of proof for obtaining a permanent injunction pursuant to RCRA was in no way affected by the timing of Denver's decision to restrict full-plane gate deicing. Petitioners simply did not present sufficient factual evidence to support their speculative assertion of imminent and substantial endangerment.

As the Court of Appeals observed, a permanent injunction presumably could have issued pursuant to RCRA if Petitioners were able to present evidence (1) that Denver would likely resume full-plane gate deicing and (2) that such a future resumption may result in the generation of hydrogen sulfide gas in amounts sufficient to endanger public health at DIA. [Pet. Appx. page 20.] Petitioners' failure of proof on both counts simply does not implicate any question of federal law that calls for the exercise of this Court's supervisory power.

CONCLUSION

Petitioners base their Petition for Writ of Certiorari on the incorrect assertion that Denver banned full-plane gate deicing "in direct response to Petitioners' RCRA citizen suit." In fact, the District Court made a factual finding that the policy of restricting full-plane gate deicing was the result of a number of economic and operational factors which were unrelated to Petitioners' lawsuit and which would continue to be in effect in the future.

Petitioners' failure of proof in this regard was compounded by the District Court's factual finding that, even if there was a resumption of full-plane gate deicing, Petitioners had not produced sufficient evidence to prove that the deicing procedure would likely

generate enough hydrogen sulfide gas to pose a hazard to public health.

Based on these two factual findings, the District Court concluded that Petitioners were not entitled to injunctive relief under RCRA because any potential endangerment from the future use of propylene glycol was neither substantial nor imminent.

On review, the Tenth Circuit Court of Appeals made a straightforward application of well-established case law and ruled that RCRA liability requires proof that a defendant's handling of a solid waste may create a present or imminent risk that a harm will result in the future if remedial measures are not taken. Applying established standards, the Court of Appeals concluded that a permanent injunction was not warranted because Petitioners failed to prove at trial (1) that Denver would likely resume full-plane gate deicing and (2) that a resumption of full-plane gate deicing may result in the generation of sufficient amounts of hydrogen sulfide gas to endanger public health at DIA.

The rulings by the District Court and the Tenth Circuit Court of Appeals were based on sound factual findings applied to settled law concerning the standards for imposing RCRA liability. Accordingly, the Petition for Writ of Certiorari does not present an important question of law that is worthy of this Court's consideration and review. Respondent City and County of Denver, Colorado, therefore respectfully

requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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